

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 569 Nursing Home Litigation

SPONSOR(S): Civil Justice Subcommittee

TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 670

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee		Ward	Bond

SUMMARY ANALYSIS

Current law creates a statutory cause of action for a nursing home resident alleging negligence to sue the nursing home facility and others. The bill:

- Limits the class of persons who may be sued in the initial pleading for negligence or a violation of a nursing home resident's rights to only the nursing home licensee and its management or consulting company, managing employees, and direct caregivers, whether employees or contracted. A passive investor is shielded from liability. Definitions are provided for these individuals or entities;
- Provides that the statutory cause of action is the exclusive remedy against a nursing home licensee, its management or consulting company, managing employees, and direct caregivers alleging direct or vicarious liability for the recovery of damages for the personal injury or death of a nursing home resident arising out of negligence or a violation of a resident's statutory rights;
- Provides that a claimant who believes any other person was negligent and thus liable to the resident must get court permission to add such parties to the action as defendants;
- Specifies when a claimant must elect either survival damages or wrongful death damages;
- Requires the court to hold an evidentiary hearing before allowing a claim for punitive damages to proceed;
- Requires payment of a judgment within 60 days, unless agreed otherwise, or the nursing home is subject to licensure sanction by the Agency for Health Care Administration (AHCA or Agency); and
- Revises provisions relating to the release of a nursing home resident's records.

This bill appears to have an unknown recurring fiscal impact on the state court system and upon the Agency for Health Care Administration. The bill does not appear to have a fiscal impact on local governments.

The bill provides that it takes effect upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

A nursing home is a facility that provides "24-hour nursing care, personal care, or custodial care for three or more persons . . . who by reason of illness, physical infirmity, or advanced age require [nursing] services" outside of a hospital.¹ Florida nursing homes are regulated under Part II of ch. 400, F.S. The Agency for Health Care Administration (AHCA) is charged with the responsibility of developing rules related to the operation of nursing homes.

Section 400.022, F.S., sets forth various legal rights of nursing home residents. Included in those rights is the right to receive "adequate and appropriate health care and protective and support services." Section 400.023, F.S., provides that any resident whose rights are violated by a nursing home has a cause of action against the nursing home.² Sections 400.023-.0238, F.S., create a comprehensive framework for litigation and recovery against a nursing home, including provisions for presuit notice, mediation, availability of records, and punitive damages.

Named Defendants in Nursing Home Cases

Section 400.023, F.S., provides that "any resident whose rights as specified in this part are violated shall have a cause of action." It does not limit who can be named as a defendant in the lawsuit.

This bill provides that only the nursing home licensee, the licensee's management or consulting company, the licensee's managing employees, or a direct caregiver employee may be sued for a violation of a nursing home resident's rights. The bill further provides that a "passive investor is not liable" for a violation of a resident's rights.

The bill creates the following definitions regarding these positions:

- "Licensee" means an individual, corporation, partnership, firm, association, governmental entity, or other entity that is issued a permit, registration, certificate, or license by the agency, and that is legally responsible for all aspects of the operation of the nursing home facility.
- "Management or consulting company" means an individual or entity who contracts with, or receives a fee from a licensee to provide any of the following services for a nursing home facility:
 - Hiring or firing of the administrator or director of nursing;
 - Controlling or having control over the staffing levels at the facility;
 - Having control over the budget of the facility; or
 - Implementing and enforcing the policies and procedures of the facility.
- "Passive investor" means an individual or entity that does not participate in the decisionmaking or operations of a facility.

The bill further provides, regarding named defendants, that before a person other than the licensee, the licensee's management or consulting company, the licensee's managing employees, or a direct caregiver employee can be named as a defendant in a lawsuit alleging violation of a resident's rights, the court or arbitration panel must find that there is sufficient evidence that the individual or entity owed

¹ Section 400.021(7), F.S.

² The action may be brought by the resident or his or her guardian, by a person or organization acting on behalf of a resident with the consent of the resident or his or her guardian, or by the personal representative of the estate of a deceased resident regardless of the cause of death. See s. 400.023(1), F.S.

a duty of reasonable care to the resident and the individual or entity breached that duty; and the breach of that duty is a legal cause of loss, injury, or damage to or death of the resident. If the court or arbitration panel makes this finding, and if in a proposed amended pleading it is asserted that such cause of action arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the proposed amendment relates back to the original pleading.³

Election of Remedy

Where a violation of rights resulted in the death of a resident, current law requires the resident's estate to elect either survival damages under s. 46.021, F.S., or wrongful death damages under s. 768.21, F.S. Current law is unclear as to when the resident's estate must make the election.⁴

The bill provides that the election of remedies must be made after the verdict and before the judgment is entered.

Causes of Action in Nursing Home Cases

Section 400.023, F.S., provides that "any resident whose rights as specified in this part are violated shall have a cause of action." The statute is cumulative to other types of lawsuits, that is, an aggrieved resident may sue under the statute and may sue under some other legal theory if appropriate.

In general, a statute creating a remedy is considered cumulative to all other remedies. A remedy created by statute may only supplant other statutory and common law remedies if the statute specifically states that it is an exclusive remedy.⁵ Section 400.023, F.S., is not an exclusive remedy statute.⁶

This bill amends s. 400.023, F.S., to provide that the provisions of ss. 400.023-.0238, F.S., are the exclusive remedy against a licensee or management company for a cause of action for recovery of personal injury or death of a nursing home resident arising out of negligence or a violation of a resident's statutory rights.

Punitive Damages - Preliminary Finding

Punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."⁷ Punitive damages are generally limited to three times the amount of compensatory damages or \$1 million, whichever is greater.⁸ Damages can exceed \$1 million if the jury finds that the wrongful conduct was motivated primarily by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant.⁹ If the jury finds that the defendant had a specific intent to harm the claimant and determines that the defendant's conduct did in fact harm the claimant, there is no cap on punitive damages.¹⁰

Current law at s. 400.0237, F.S., allows a claim for punitive damages in a suit alleging a violation of the rights of a nursing home resident. A claimant may not allege a claim in the initial complaint, but must make a reasonable showing that shows a reasonable basis for recovery. A court discussed how a claimant may make a proffer to assert a punitive damages claim:

³ An amended pleading that relates back is considered to have been filed when the original lawsuit was filed for purposes of determining compliance with the statute of limitations.

⁴ *In re Estate of Trollinger*, 9 So.3d 667 (Fla. 2d DCA 2009).

⁵ *St. Angelo v. Healthcare and Retirement Corp. of America*, 824 So.2d 997, 999 (Fla. 4th DCA 2002).

⁶ *Id.* at 1000.

⁷ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

⁸ See s. 400.0238(1)(a), F.S.

⁹ See s. 400.0238(1)(b), F.S.

¹⁰ See s. 400.0238(1)(c), F.S.

[A] 'proffer' according to traditional notions of the term, connotes merely an 'offer' of evidence and neither the term standing alone nor the statute itself calls for an adjudication of the underlying veracity of that which is submitted, much less for countervailing evidentiary submissions. Therefore, a proffer is merely a representation of what evidence the defendant proposes to present and is not actual evidence. A reasonable showing by evidence in the record would typically include depositions, interrogatories, and requests for admissions that have been filed with the court. Hence, an evidentiary hearing where witnesses testify and evidence is offered and scrutinized under the pertinent evidentiary rules, as in a trial, is neither contemplated nor mandated by the statute in order to determine whether a reasonable basis has been established to plead punitive damages.^{11,12}

The bill provides that a claimant may not bring a claim for punitive damages unless admissible evidence submitted by the parties provides a reasonable basis for the recovery of punitive damages. The bill thus appears to require the court to conduct an evidentiary hearing rather than accept a simple proffer. The court must determine whether there is sufficient admissible evidence to ensure that there is a reasonable basis to believe that the claimant can demonstrate at trial, by clear and convincing evidence, that the recovery of punitive damages is warranted under a claim for direct or vicarious liability.

Punitive Damages - Against Wrongdoer

Section 400.0237(2), F.S., provides that a defendant in a lawsuit alleging a violation of a nursing home resident's rights may only be liable for punitive damages upon a finding that the defendant personally committed intentional misconduct or committed gross negligence. "Intentional misconduct" means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage. "Gross negligence" means that the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

The bill amends s. 400.0237(2), F.S., to require a showing that the defendant "actively and knowingly participated in intentional misconduct or engaged in conduct that constitutes gross negligence and contributed to the loss, damages, or injury suffered by the claimant." The intentional misconduct must have been committed by that defendant.

Punitive Damages - Vicarious Liability

A punitive damages claim is sometimes brought under a theory of vicarious liability. Vicarious liability is the "imposition of liability on one person for the actionable conduct of another, based solely on a relationship between the two persons."¹³ Vicarious liability applies to both general liability and liability for punitive damages, and commonly applies to situations where an employer is held responsible for the acts of an employee.

The bill amends s. 400.0237(3), F.S., the section on vicarious liability for punitive damages law related to a claim for violation of rights of a nursing home resident, to remove two paragraphs that define direct liability for punitive damages.¹⁴

Judgments against a Nursing Home

¹¹ *Estate of Despain v. Avante Group, Inc.*, 900 So. 2d 637, 642 (Fla. 5th DCA)(internal citations omitted).

¹² The *Despain* court was discussing a prior version of the punitive damages statute relating to nursing home litigation, but the language on proffering in that statute is the same as that in current law.

¹³ Black's Law Dictionary, Sixth Edition, at 1566.

¹⁴ The two removed paragraphs are: "(a) The employer, principal, corporation, or other legal entity actively and knowingly participated in such conduct;" and "(c) The employer, principal, corporation, or other legal entity engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant."

Current law does not specifically address the situation where a nursing home fails to pay an adverse final judgment after being found to have violated a resident's rights.

The bill provides that when an adverse judgment that arises from a court award, arbitration award, or settlement agreement relating to a claim of negligence or violation of a resident's rights against a licensee is final, the licensee must pay the judgment creditor the entire amount of the judgment and all accrued interest within 60 days, unless otherwise mutually agreed to in writing by the parties. If the licensee does not do so, the Agency may suspend the nursing home's license, deny a license renewal application, or deny a change of ownership application.

The bill outlines the procedures the Agency must follow upon notification of the existence of an unsatisfied judgment or settlement. The Agency must notify the licensee that within 30 days after receipt of the notification the licensee is subject to disciplinary action unless it provides the Agency with proof of compliance with one of five conditions pertaining to the judgment or settlement. The five conditions are:

- The judgment or settlement has been paid;
- A mutually agreed upon payment plan exists;
- A notice of appeal has been timely filed;
- A court order staying execution of the final judgment exists; or
- The court or arbitration panel that is overseeing the action documents that the licensee is seeking indemnification from an insurance carrier or other party that may be required to pay the award.

If the licensee fails to provide proof of one of the five conditions within the 30 days, the Agency must issue an emergency order finding that the nursing home facility lacks financial ability to operate and that the Agency is in the process of suspending the facility's license. Following or during the period of suspension, a controlling interest in that facility may not seek licensure for the facility at issue. Additionally, if the judgment results from a trial or arbitration, the Agency may not approve a change of ownership until one of the five conditions is met with respect to the judgment.

Release of a Resident's Records

This bill substantially rewords current law regarding release of a resident's records to comply with the federal Health Insurance Portability and Accountability Act¹⁵ (HIPAA) and to provide for release of a resident's medical records.

Upon receipt of a written request that complies with HIPAA or this section of law, a nursing home must provide to a competent resident or to a resident's representative who is authorized to make requests for the resident's records copies of medical records and records concerning the care and treatment of the resident performed by the facility. However, progress notes and consultation report sections of a psychiatric nature may not be released.

The bill requires the nursing home to provide the requested records within 14 working days after receipt of a request relating to a current resident or within 30 working days after receipt of a request relating to a former resident. Current law requires a nursing home to release requested records pertaining to a current resident within 7 working days after receipt of a written request and within 10 working days after receipt of a written request pertaining to a former resident.

The bill identifies to whom and under what circumstances medical records relating to a deceased resident may be released. The list is presented in the order of priority, as follows:

- A court appointed personal representative, executor, administrator, or temporary administrator of the deceased resident's estate, upon submission of a copy of the court order;

- If a judicial appointment has not been made, a person designated in the deceased resident's legally valid will to act as his or her representative, upon submission of a copy of the will; or
- If a judicial appointment or person designated by will is not available, the following individuals may request the medical records upon submission of a letter from the person's attorney verifying the relationship to the deceased resident:
 - A surviving spouse;
 - A surviving child of the resident if there is no spouse; or
 - A parent of the resident if there is no spouse or child.

The bill authorizes a nursing home to refuse to release records to the resident if it would be detrimental to the physical or mental health of the resident. However, the nursing home must provide the records to another medical provider designated by the resident.

A nursing home is granted immunity from criminal or civil laws and is not civilly liable to the resident or other persons for any damages resulting from release of the medical records if the nursing home relies on this section of law and releases the records in good faith. The Agency may not cite a nursing home through the survey process for noncompliance with the requirements of this section of law.

The bill restates current law¹⁶ with respect to the fees a nursing home may charge for copies of the records and allowing an authorized person to examine original records on site. The fees may not exceed \$1 per page for the first 25 pages and 25 cents for each additional page. As in current law, the bill provides that a nursing home is not required to provide copies of requested records more frequently than once per month, except that copies of physician reports must be released as often as necessary to allow the effective monitoring of the resident's condition.

Effective Date

The portions of the bill regarding payment of a judgment and access to nursing home records take effect upon becoming a law. The remaining portions of the bill, related to liability of a nursing home, are effective upon becoming law but only apply to causes of action that accrue on or after that date.

B. SECTION DIRECTORY:

Section 1 amends s. 400.023, F.S., relating to civil enforcement.

Section 2 amends s. 400.0237, F.S., relating to punitive damages; pleading; burden of proof.

Section 3 creates s. 400.024, F.S., relating to failure to satisfy a judgment or settlement agreement.

Section 4 amends s. 400.145, F.S., relating to records of care and treatment of resident; copies to be furnished.

Section 5 creates an unnumbered section of law to apply the amendments to ss. 400.023 and 400.0237, F.S., to causes of action accruing on or after the effective date of this act. provides that the bill takes effect upon becoming law.

Section 6 provides that the bill shall take effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

¹⁶ See s. 400.145, F.S.
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2. Expenditures:

The Agency for Health Care Administration may incur administrative and legal costs as it assumes responsibility to notify nursing homes that have not satisfied adverse final judgments or entered into definite terms of a settlement agreement. The Agency may incur administrative and legal costs in enforcing any unpaid judgments by pursuing emergency suspensions and final suspension of nursing home licenses if the statutory conditions are not met. An Agency analysis has not been received yet so the cost is indeterminate at this time.

There may be additional costs to the court system due to the additional hearings required by the bill. "Increased judicial time and court workload may be anticipated should proposed language be adopted requiring the courts conduct additional evidentiary hearings. Specifically, new language under ss. 400.023(2) and 400.023(1)(b), F.S., respectively requires the courts to determine whether to permit actions against persons or entities other than a nursing home licensee, a management company employed by the licensee, or a direct caregiver employee and whether sufficient evidence exists to support claims for recovery of punitive damages." "The fiscal impact on expenditures of the State Courts System cannot be accurately determined due to the unavailability of data needed to quantifiably establish the increase in judicial time and court workload as discussed in Section III, Anticipated Judicial or Court Workload Impact. . . ." ¹⁷

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have a direct impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

The state constitution provides that the "courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." In *Kluger v. White*, 281 So.2d (Fla. 1973), the Florida Supreme Court held that:

[w]here a right of access to the courts for redress for a particular injury has been provided...the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the

¹⁷ Office of State Courts Administrator, 2014 Judicial Impact Statement regarding SB 670, dated February 10, 2014, on file with the House or Representatives, Civil Justice Subcommittee.

abolishment of such right, and no alternative method of meeting such public necessity can be shown.¹⁸

This bill limits lawsuits against passive investors of a nursing home and provides that the remedies of ss. 400.023-.0238, F.S., are exclusive remedies, thereby foreclosing use of other remedies. Because injured parties would still have a remedy, it is possible that these limits do not implicate the Access to Courts provision. On the other hand, because these limits may limit tort remedies, the courts may review these limits under *Kluger* to determine whether the statutory remedies are a "reasonable alternative."

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

¹⁸ *Kluger v. White*, 281 So.2d 1, 4 (Fla. 1973).
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